

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELSIE G. DIBARTOLOMEO and DEPARTMENT OF THE NAVY,
FLEET & INDUSTRIAL SUPPLY CENTER, Philadelphia, PA

*Docket No. 02-15; Submitted on the Record;
Issued September 13, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$9,721.34 which occurred because she received augmented compensation for the period November 29, 1997 through September 10, 2000 during which time her husband was no longer a dependent; (2) whether appellant was properly determined to be at fault in the creation of the overpayment and therefore not eligible for waiver of recovery of the overpayment; and (3) whether the Office abused its discretion in determining the rate of recovery of the overpayment at \$500.00 per compensation cycle of the overpayment.

The Office accepted that, on July 13, 1984 appellant, then a 36-year-old management analyst, sustained left foot contusions, toe dislocations and fractures, lumbosacral strain, left shoulder tendinitis and right patellofemoral chondromalacia when she tripped during the performance of duty. Appellant returned to work on permanent light duty and sustained a recurrence of disability on November 1, 1989. She thereafter received compensation on the periodic rolls on an augmented basis, as she claimed her husband as a dependent.

On September 22, 1997 appellant completed a Form CA-1032 indicating that she was claiming her husband as a dependent. She was advised on that form under Part C that a claimant who has no eligible dependents is paid compensation at the 66 2/3 percent rate, while a claimant who has one or more eligible dependents is paid compensation at a 75 percent applicable pay rate. Appellant was also advised as to whom was considered an eligible dependent, including: (1) a husband living with her; (2) an unmarried child, including an adopted child or stepchild who lives with her and is under 18 years of age; (3) an unmarried child who is 18 or over, but who cannot support himself or herself because of mental or physical disability; (4) an unmarried child under 23 years of age who is a full-time student and has not completed four years of school beyond the high school level; or (5) a parent who totally depends on her for support. She completed the form indicating that she was married, that her husband was a dependent who resided with her and that she did not claim compensation on account of any other dependent such as a child.

Appellant's dependent husband died on November 29, 1997, however, she continued to receive compensation at the augmented rate until September 10, 2000. She did not complete a Form CA-1032 in 1998.

Appellant completed another Form CA-1032 on May 1, 1999 claiming that she was married and that her husband lived with her as a dependent. She indicated that she was not claiming compensation on account of other dependents such as children.

However, on August 13, 2000 appellant again completed a Form CA-1032 in which she answered "yes" to the question of whether she was married, "no" to the question of whether her husband lived with her, but "yes" to the question of whether she was claiming augmented compensation on account of another dependent. Appellant indicated that her granddaughter Jessica had lived with her for over three years since her mother deserted her.

On October 10, 2000 the Office issued appellant a preliminary determination that an overpayment in the amount of \$9,721.34 had occurred because she had continued to receive augmented compensation after November 29, 1997, the date her husband died, through September 10, 2000. The Office found that appellant was at fault in the creation of the overpayment as she knew her spouse had passed away on November 29, 1997 yet she did not promptly notify the Office that she no longer had a qualified dependent and she made false statements on her May 1, 1999 Form CA-1032 indicating that she was still married and that her husband still lived with her as a dependent. The Office gave appellant 30 days within which to submit evidence or arguments if she disagreed with the fact or amount of the overpayment.

Appellant requested a prerecoumpment hearing which was held on April 25, 2001, at which she testified. She also submitted multiple financial statements and reports detailing her income and expenses.

By decision dated June 18, 2001, the hearing representative finalized the finding of fact of overpayment, amount and fault. The hearing representative found that, although appellant ceased to have an eligible dependent for compensation purposes on November 29, 1997 when her husband died, her compensation was not reduced to the two-thirds rate until September 10, 2000. Therefore, the hearing representative found that appellant received an overpayment of compensation in the amount of \$9,721.34. The hearing representative further found that appellant was at fault in the creation of the overpayment, such that she was not entitled to waiver. Appellant claimed that she notified the Office of her loss of dependent multiple times by telephone and in writing, including a copy of her husband's death certificate, but that the Office never responded. She claimed that, thereafter her son's child came to live with her and that, therefore, she assumed that her grandchild counted as a dependent, such that she continued to be entitled to compensation at the augmented rate. The hearing representative found that appellant had been advised of who constituted a dependent for augmented compensation purposes, that the record following her husband's death did not show any telephone calls or letters received from appellant, and that appellant had erroneously completed the Form CA-1032 on May 1, 1999 indicating that she was still married and that he still lived with her. The hearing representative found that this May 1, 1999 Form CA-1032 completion claiming augmented compensation on behalf of her husband instead of on behalf of her granddaughter, argued against her allegations of belief in her entitlement due to her

granddaughter. The hearing representative noted that, in completing an August 13, 2000 Form CA-1032, appellant again indicated that she was married, but noted that her husband was not living with her and that, when the Office checked with her about this discrepancy, she first notified the Office that her husband had died on November 29, 1997. Therefore, the hearing representative concluded that appellant was at fault in creating the overpayment because she failed to timely notify the Office of her husband's death, because she made incorrect statements on an official form in 1999 and 2000 that she was still married, and because she accepted augmented compensation payments that she knew were incorrect.

The hearing representative reviewed appellant's financial information, calculated that she had \$3,273.00 in monthly income and \$2,586.78 in allowable ordinary and necessary monthly expenses, such that she had \$686.22 excess monthly income from which to recover the overpayment. The hearing representative determined that to collect the overpayment expediently and avoid hardship for appellant, recovery would best be accomplished by withholding \$500.00 every 28 days from appellant's continuing compensation benefits.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$9,721.34 for the period November 29, 1997 through September 10, 2000.

The Office correctly determined that the overpayment occurred because appellant received and retained compensation for temporary total disability at the augmented rate for the period November 29, 1997 through September 10, 2000 during which time her husband was no longer a dependent. As appellant's husband died on November 29, 1997, from that time onward she was not entitled to compensation at the augmented rate and her claimed belief that her grandchild residing with her entitled her to augmented compensation is not supported by the facts as indicated on the Forms CA-1032 completed on May 1, 1999 and August 13, 2000. Therefore, an overpayment in the amount of \$9,721.34 occurred because appellant's compensation continued at the augmented rate through September 10, 2000 when she was not entitled to such.

The Board further finds that appellant was at fault in the creation of this overpayment of compensation such that recovery of the overpayment is not subject to waiver.

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment of compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscious."¹ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault in its creation.² Section 10.433(a) of Title 20 of the Code of Federal Regulations explains that the Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible

¹ 5 U.S.C. § 8129.

² See *Beverly E. Labbe*, 50 ECAB 440 (1999); *Harold W. Steele*, 38 ECAB 245 (1986) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

for taking all reasonable measures to ensure that payments he or she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect;

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

In this case, appellant knew, from her previous periodic receipt and completion of multiple Forms CA-1032 dating from November 1, 1989, that she was required to promptly and truthfully report any changes in her dependent's status. She therefore knew, or should have known, that after her husband dies on November 29, 1997 she was no longer entitled to augmented compensation benefits. However, appellant continued to receive these augmented compensation payments, did not advise the Office of her change in dependent status, made incorrect statements on official Office forms, and did not return the improper payments to the Office, but instead kept and cashed the checks. Appellant's argument that she thought that she was entitled to augmented compensation on behalf of her granddaughter was disingenuous as she falsely completed the Forms CA-1032 listing her deceased husband as her qualifying dependent and not her grandchild. Therefore, under 20 C.F.R. § 10.433(a)(1),(2) and (3) respectively, the Office properly found that appellant was at fault in the creation of the overpayment amount because she made incorrect statements on official forms in 1999 and 2000 that she was still married, because she failed to timely notify the Office of her husband's death and because she accepted augmented compensation payments that she knew were incorrect. Accordingly, no waiver of recovery of the overpayment is possible.

The Board also finds that the rate of recovery of the overpayment by withholding \$500.00 per compensation cycle was properly determined.

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same.³ If no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.

In the instant case, according to the overpayment recovery questionnaire and other documentary evidence of record appellant's monthly income equaled approximately \$3,273.00 per month, and her allowable "ordinary and necessary" monthly expenses amounted to

³ 20 C.F.R. § 10.441(a).

approximately \$2,586.78.⁴ The Office procedure manual explains that the finding that a type of expense is ordinary and necessary does not mean that the amount is ordinary and necessary, such that the burden is on the claimant to show that the expenses claimed are normal and needed for a legitimate purpose. Appellant has provided no such elucidation related to her claimed large ordinary and necessary expenses in this case. Reducing these expenses to an ordinary level, as well as eliminating the nonordinary and nonnecessary expenses from the monthly expenses tabulation results in the difference between monthly income and permissible expenses as being approximately \$686.22 per month excess income from which to recover the overpayment.

The Board, therefore, finds that the Office determination that the overpayment would be recovered by withholding \$500.00 per month from appellant's continuing compensation benefits is not unreasonable, as appellant is left with \$186.22 in excess income per month after such withholding and that it is a rate at which the overpayment will be recovered within the least amount of time without causing hardship on appellant.

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 18, 2001 is hereby affirmed.

Dated, Washington, DC
September 13, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ Ordinary and necessary living expenses include fixed living expenses, expenses for one or two vehicles, unreimbursed medical expenses, expenses for support of others, charitable contributions made on a regular basis, and miscellaneous expenses not to exceed \$50.00. Appellant, however, claimed unusually large amounts for accepted fixed living expenses. Several of the expenses claimed by appellant are not considered to be ordinary and necessary recurring expenses, and therefore do not figure in the calculation of income available for recovery of the overpayment. These include numerous one-time expenses such as certain home repairs, certain vehicle repairs, a new coat and new glasses, and internet connection through a service provider, cable TV and long distance telephone calls. See Federal (FECA) Procedure Manual, Part -- 6, Debt Management, *Initial Overpayment Actions*, Chapter 6.200. because she failed to timely notify the Office of her husband's death, 6(3). Therefore, the reasonable amount of monthly expenses seems, based upon the remainder of the overpayment recovery questionnaire, to be approximately \$2,586.78, leaving \$686.22 excess income per month available for recovery of the overpayment.